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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 632

OSCAR L. MIMS,

Petitioner,

versus

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CRAMPTON HARRIS,
Attorney for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Oscar L. Mims, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

The Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on December 17th, 1952.

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

Oscar L. Mims sued the Metropolitan Life Insurance Company for a false and malicious libel contained in a letter written in New York by the President of the Metropolitan Life Insurance Company to Senator John Sparkman of Alabama in Washington, D. C. The first count of the complaint charged a publication of the libel by its dictation to and transcription by a stenographer in New York. The second count charged a publication of the libel by its communication to Senator Sparkman in Washington, D. C. The defendant admitted the writing of the letter and did not claim truth as a defense.

The District Judge rendered summary judgment for the defendant. His written opinion assigns four grounds for the summary judgment, to-wit:

First: "The court finds that the letter was absolutely priveleged and no action is maintainable thereon."

Second: "Dictation of a letter by an officer or an employee of a corporation to a stenographer in the employ of that corporation, and its subsequent transcription and signature, is not a publication by the corporation employer."

Third: "Senator Sparkman was acting at the request of the plaintiff, and, so far as concerns the plaintiff, must be considered as his representative, with the result that the communication of the letter to Senator Sparkman was not a publication to a third person."

Fourth: "The plaintiff * * * is precluded by the application of the principle of volenti non fit injuria from recovering as for a publication of the letter."

With Judge Rives dissenting, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on the express ground that there was no publication in New York and none in Washington.

The questions presented by the express language of the Court of Appeals are as follows:

1. Is it the law in the state of New York that dictation of a letter by an officer of a corporation to a stenographer in the employ of that corporation and its subsequent transcription by the stenographer is not a publication by the corporation employer?

2. Is it the law of the District of Columbia that a United States Senator, when writing and asking for such information as the defendant may care to give, must be considered as the representative of the plaintiff, who suggested that he write, so that a letter in reply to the Senator is in contemplation of law a reply to the plainiff himself and not a publication to a third person?

Two important questions are presented by the failure of the Court of Appeals to overrule the opinion of the District Judge, to-wit:

(A) Where a United States Senator asks a defendant for such information as defendant might care to give, is the reply thereto absolutely privileged so that no action is maintainable thereon?

(B) Where a United States Senator, at the suggestion of the plaintiff, asked defendant for such information as defendant might care to give, did this suggestion by plaintiff operate as his request for and consent to the giving of misinformation in the form of a false and malicious libel by the defendant?

Statement

The facts in the case as stated by the Court of Appeals for the Fifth Circuit are as follows:

> "After about 32 years in the employ of defendant company as a branch manager and in other capacities, plaintiff was discharged. He suspected that the reason

for this discharge was his refusal to contribute $1.00 to the campaign fund of Senator Taft of Ohio, as suggested in a chain letter sent by defendant's supervisor of agencies in New York to a group of local agency managers, one of whom in turn forwarded a copy to plaintiff. In February, 1950, plaintiff replied to the agent from whom he received the copy that he was not in sympathy with Senator Taft's policies, and declined to contribute.

"When plaintiff's services were discontinued early in 1951, he wrote to his friend Senator Sparkman of Alabama, asking the latter to investigate the cause thereof. Pursuant to this request, and with plaintiff's knowledge and approval, Senator Sparkman directed a letter of inquiry to the defendant's president in New York, summarizing Senator Sparkman's understanding of the situation, and concluding: 'I shall appreciate your attention to this matter and your giving me such information as you may care to give.'

"Defendant's president replied at length by letter, denying that plaintiff's discharge was in any way due to his refusal to contribute to the campaign fund, and stating in effect that it was due to inefficiency and to unsatisfactory production in the branch agencies of which plaintiff was manager from 1934 to 1951, so that it finally became necessary to discontinue plaintiff's services. The letter concludes that the only mistake made by defendant was in giving plaintiff so long an opportunity to make good, in the hope that he might improve. That letter is the basis of this suit. Plaintiff asserts that the statements therein are false, made with malice, and are therefore libelous and unprivileged.

"The letter in question was dictated by the president of the defendant company to a company-employed stenographer, who wrote it. It was then mailed to Senator Sparkman in reply to his inquiry, and was received and read by him in Washington, D. C. Plaintiff relies on these circumstances as a sufficient publication to support an action for libel against the corporate defendant. It is not charged that the letter was seen by any other person."

Reasons for Granting the Writ of Certiorari

1. The court below has affirmed the judgment of a District Judge whose opinion invites intereference with all legislative functions of the United States Senate by conferring an absolute privilege on those who, in answer to a Senator asking for information, write false and libelous letters in order to prevent senatorial investigations. By affirming without denying the absolute privilege thus conferred, the court below has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2. The court below has decided an important question of libel of the local law of the District of Columbia in a way in conflict with applicable local decisions in this: The court has decided that a communication in reply to a United States Senator who, on behalf of the plaintiff, and at the plaintiff's suggestion, wrote and asked for such information as the defendant might care to give, is not a publication thereof.

3. The court below has rendered a decision in this case which is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia on the same matter of publication in the case of *National Disabled Soldiers' League* v. *Haan*, 4 F(2d) 436.

4. The court below has decided an important question of federal law of libel applicable to the District of Columbia which has not been, but should be, settled by this court.

5. The court below has decided an important question of libel in the local law of the state of New York in a way in conflict with applicable local decisions in this: The court has decided that dictation of a letter by an officer of a corporation to a stenographer in the employ of the corpora-

tion and its subsequent transcription, is not a publication by the corporation employer.

6. The court below has affirmed a judgment of a District Judge whose opinion erroneously holds that where a United States Senator, at the suggestion of the plaintiff, asked defendant for such information as defendant might care to give, such suggestion by the plaintiff invokes the application of the principle of volenti non fit injuria so that the plaintiff cannot recover for the giving of misinformation in the form of a false and malicious libel by the defendant.

For the foregoing reasons the petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAMPTON HARRIS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 632

OSCAR L. MIMS,

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versus

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit, handed down on December 17th, 1952, appear in the record at pages 196-204.

Grounds on Which Jurisdiction of This Court is Invoked

1. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

Statement of the Case

The case is stated in the accompanying petition for writ of certiorari at page 3.

Specifications of Error

1. The court below erred in failing to reverse the judgment of the District Court and failing to overrule the holding of that court that a libelous letter to a United States Senator, in response to his letter of inquiry, is in the nature of a statement made in a judicial proceeding and is therefore clothed with an absolute privilege so that no action is maintainable thereon.

2. The court below erred in not reversing the holding that where a United States Senator, at the suggestion of the plaintiff, asked defendant for such information as defendant might care to give, such request on the part of the plaintiff, operated as a request for and consent to the giving of misinformation in the form of a false and malicious libel by the defendant.

3. The court below erred in holding that there was no publication of the libelous letter in Washington, D. C. contrary to a controlling decision of the United States Court of Appeals for the District of Columbia on the same matter of publication in the case of *National Disabled Soldiers' League* v. *Haan*, 4 F. (2d) 436.

4. The court below erred in holding that it is the law of the District of Columbia that a United States Senator, when writing and asking for such information as the defendant may care to give, must be considered as a representative of the plaintiff who suggested that he write, so that a letter in reply to the Senator is in contemplation of law a reply to the plaintiff himself.

5. The court below erred in holding that under New York law, the dictation of a letter by an officer of a corporation to a stenographer in the employ of the corporation and its subsequent transcription by the stenographer is not a publication by the corporation.

Summary of the Argument

The absolute privilege of a United States Senator is limited to a speech or debate on the floor of the Senate and to work authorized by the Senate.

The opinion of the District Judge confers upon a Senator's correspondent an absolute privilege which no provision of the Constitution, no Act of Congress and no court decision we have been able to find, confers upon the Senator himself.

The courts will not enjoin a Senate Investigating Committee and should not give outsiders an absolute privilege under which they can, with impunity, use false, malicious and libelous statements to prevent or hinder the institution of Senatorial investigations.

Since questions of the substantive law of libel are governed by the law of the place where the libel is published, this court is concerned with the law of New York and the law of the District of Columbia. Publication results from dictation where the stenographic notes have been transcribed. There is nothing in Judge Cardozo's opinion in *Ostrowe* v. *Lee*, 256 N. Y. 36, 175 N. E. 505, to indicate there would be no publication if the person dictating were an officer of a corporation and the stenographer its employee.

The United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the District of Columbia are in conflict on the question of publication of a libel in the District of Columbia.

Argument

Specification of Error No. 1

The decisions of the courts below affect the great legislative processes of our national government. A hindrance

to the effective exercise of the legislative function of the Congress is found in this language of the District Judge:

> "The Court is of the opinion and finds that the alleged defamatory matter complained of in each count of the complaint was contained in a letter from defendant to the Hon. John Sparkman, a member of the Senate of the United States, in reply to a request by Senator Sparkman, while acting in his official capacity, for information pertaining to the matter of the election of another member of the Senate of the United States; that Senator Sparkman in making such request was acting pursuant to his duty and in his capacity as a component of the Senate of the United States pursuant and incident to the judicial authority and jurisdiction of the Senate as granted by Article I, Section 5, of the Constitution of the United States, as follows: 'Each House shall be the judge of the elections, returns and qualifications of its own members'; that the inquiry made by Senator Sparkman was a phase and part of a proceeding judicial in nature and that the statements made in reply thereto were pertinent to the inquiry and are entitled to the immunity of statements made in judicial proceedings."

An inspection of the practical operation of the Congress of the United States impresses one with the high importance of Congressional investigations in our governmental system. Such investigations are helpful in two different ways. In one they bring to the lawmakers the factual knowledge of devious and dangerous practices so carefully devised and hidden they would never be uncovered but for an investigating committee of the Congress. As a result of such investigations the lawmakers acquire knowledge to frame laws for actual situations. The other source of strength is in the fear of such investigations and the consequent restraint upon those who would engage in hurtful procedures.

The founding fathers were careful to limit the absolute privilege of a member of Congress in these words: "And for any speech or debate in either House, they shall not be questioned in any other place." We have not found a decision of any court which gives to members of Congress an absolute privilege that goes with them at all times and everywhere. The opinion of the District Court confers a greater privilege upon a lawbreaker than the Constitution of the United States does upon a lawmaker. It seems a strange departure from correct reasoning to hold that a United States Senator, by writing a letter to an outsider, can thereby confer upon the outsider an absolute privilege which the United States Senator does not possess himself.

If the opinion of the District Court is to stand, every United States Senator who writes asking for information confers an absolute privilege of falsehood on the addressee. The addressee is not under oath and is under no legal duty to make reply. The only restraint resting upon him is that of his conscience and his liability in damages to those whom he falsely and maliciously libels in order to escape a Senatorial investigation. Where is any wisdom to be found in giving one hundred and fifty million people and a vast number of corporations an absolute privilege to deceive members of Congress with false and libelous communications about other citizens?

The primary assumption of the District Court is erroneous. It is not shown that the Senate of the United States authorized Senator Sparkman to conduct any judicial proceedings. He was not acting as a member of the Senate Committee or the Subcommittee on Elections. A Senator has an absolute privilege when he is engaged in the legislative function or in work which the Senate has authorized.

Section 590 of the Restatement of the Law of Torts by the American Law Institute contains this language:

> "A member of Congress of the United States or of the Legislature of any state or territory thereof is absolutely privileged to publish false and defamatory matter of another in the performance of his legislative function."

At another place in the same section it is said that the privilege "extends to the work of legislative committees or subcommittees which are engaged in an investigation or other work authorized by the legislative body, whether the work is performed while that body is in session or during a recess."

The quoted part of the opinion of the District Court is directly contrary to the only case in point. That case is *National Disabled Soldiers' League* v. *Haan*, 4 F. (2d) 436, decided by the Court of Appeals of the District of Columbia on March 2nd, 1925. In that case the defendant sent a reply to a letter from Senator Heflin, which was the basis of the plaintiffs' action. The Court of Appeals uses this language:

> "The question as to whether the publication of the alleged libelous matter was made upon a privileged occasion was one of law for the court to determine, the facts and circumstances in connection with its publication being undisputed. It is apparent that the occasion upon which the publication was made was not one of absolute privilege. Senator Heflin was not representing any committee of Congress having authority to inquire into the matters referred to in his letter to the defendant. He was acting either as an agent of the plaintiff or upon the individual responsibilities and duties of a United States Senator, and, as such, a member of the legislative branch of the government. The defendant, as an officer in the Veterans' Bureau, was under no legal obligation to report to Senator Heflin regarding the subject matter of the inquiry.

* * * * * * *

> "* * * The trial court held that the occasion upon which the libelous matter was communicated to Senator Heflin was a qualifiedly privileged one, and we are in accord with that view. * * *"

The case of *White* v. *Nicholls*, 44 U. S. 266, involved the writing of a libelous communication to the President of the United States requesting the removal of the plaintiff from the office of Collector of Customs. A similar letter was also addressed to the Secretary of the Treasury. The Supreme Court reviewed the question of absolute and qualified privilege in that case and wound up by saying at p. 291:

> "* * * We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice."

White v. *Nicholls, supra,* has been criticized in many jurisdictions but never overruled.

In *Nalle* v. *Oyster*, 230 U. S. 165, the court held that even an answer to a petition for mandamus filed in the Supreme Court of the District of Columbia was only qualifiedly privileged.

The holding of the District Court that the letter of defendant to Senator Sparkman was of the same nature and entitled to an immunity which applies to unsworn preliminary

statements in preparation for trial, to informal complaints in preparing for trial, and to informal replies in preparing for trial constitutes a perversion of the principle of privilege. The privilege mentioned was given in the first place to aid in the exercise of the judicial function. Under the instant opinion of the District Judge it would be given in order to suppress the exercise of the legislative function. The feeling which made the judges encourage the enforcement of law is now turned to prevent the enactment of laws. An effort to invoke judicial action is not the equivalent of an effort to prevent judicial action. There may be a good reason for protecting people who make complaints because they want to see the law enforced, but we can see no reason why people should be protected who want to prevent the enforcement of laws or the acquisition of information by the makers of laws.

The immunity given in a judicial proceeding to the witness put under oath and forced to answer questions now operates with equal force upon the unsworn and voluntary statements of those who want to escape the operation of the law.

SPECIFICATION OF ERROR NO. 4

This assignment challenges the holding, in the majority opinion of the court below, to the effect that the reply to Senator Sparkman was in contemplation of law, a reply to the plaintiff himself. We call the attention of this court to the following Code Section of the Code of the District of Columbia:

22-2302—Libel—Publication—Sufficiency

"To knowingly send or deliver any libelous communication to the party libeled is a sufficient publication to subject the person sending or delivering the same to punishment as provided in section 22-2301 (Mar. 3, 1901; 31 Stat. 1323, Ch. 854, Sec. 816.)"

This Code section was in effect when the letter to Senator Sparkman was delivered.

SPECIFICATION OF ERROR No. 5

This assignment challenges the holding of the court below that there was no publication in the state of New York.

There is one federal case from the state of New York dealing with the question of publication by dictation to a stenographer. In the case of *Nelson* v. *Whitten*, 272 F. 135, decided by Judge Garvin in 1921, the action was for libel in writing and publishing a letter containing false and derogatory statements. The letter was in response to a request of plaintiff for a recommendation. The eminent counsel for defendant based their demurrer on two grounds. The first was that inasmuch as the libel was communicated to defendant's stenographer only, there was no publication because a stenographer has become such a common, if not necessary, part of the methods of communication in writing that any letter would be expected to be dictated if written at all. As to this ground of demurrer the court say:

> "With respect to the first ground of demurrer the authorities are not in harmony. The English courts and some of our own hold that defendant's contention is not sound. The reasoning is that a stenographer is an individual, just as any other employee; that there is no basis for the belief that a communication made to one occupying such a position would be less injurious to plaintiff than if it were made to any other of defendant's employees, and that, as said by Lopes, L. J., in Pullman v. Hill (1891), 1 Q. B. 524:
>
> > " 'It is said that business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory state-

ments. If a merchant has occasion to write such a letter, he must write it himself and make a copy of it himself, or he must take the consequences.'

"This argument is convincing and is adopted. The demurrer is overruled, with permission to defendant to amend the answer within 20 days, if he is so advised."

The better reasoned cases from the State Courts of New York are not in accord with the decision of the court below.

In the case of *Ostrowe* v. *Lee* (Ct. of App. of N. Y., 1931), 256 N. Y. 36, 175 N. E. 505, the plaintiff charged that the defendant composed a letter accusing the plaintiff of larceny and that he dictated the letter to his stenogropher who read the notes and transcribed them. The opinion was written by Chief Justice Cardozo the year before he took his place on the Supreme Court of the United States. He said:

"* * * There is publication of a libel if a stenographer reads the notes that have been taken by another. Neither the evil nor the result is different when the notes that he reads have been taken by himself. Street, supra, p. 297, n.

"The soundness of a conclusion may not infrequently be tested by its consequences. Let us assume a case where words, unaccompanied by special damage, are libelous if written, but are not slanderous per se. Let us assume that the defamer has a grudge that will be served by defaming his victim in the thought of a particular person. Let us assume that this person is also his stenographer. With that in mind he dictates the defamatory words and instructs the stenographer to preserve and read what has been written. By hypothesis, the one defamed is without a remedy for slander. By hypothesis, too, a writing has been created at the instance of the defamer and lodged in the custody of the very person whose mind was to be poisoned. The outrage is without redress if the libel is not published when written out and read."

In the case of *Bradley* v. *Conners* (1938), 169 Misc. 442, 7 N.Y.S. (2d) 294, the defendant being a corporation, its president wrote a letter to the plaintiff libeling him. The defendants raised the question of a lack of publication because the letter had been dictated to a stenographer. The court said:

> "The second objection to the complaint is lack of publication of the libel, and the case of Wells v. Belstrat Hotel Corp'n, 212 App. Div. 366, 208 N.Y.S. 625, is cited as authority for that proposition in that the mere dictation of a letter by an officer of a corporation to a stenographer in the business of the corporation is not sufficient to constitute publication. The Wells Case was decided in the First Department in 1925. In 1931 the Court of Appeals, Judge Cardozo writing, in the case of Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505, held that there is publication of a libel when a stenographer reads notes of a defamatory statement taken by himself at the dictation of another. It is argued, however, that Judge Cardozo's opinion applies only to a case where an individual dictates to his stenographer, but that the Wells Case still applies where a corporate representative dictates to a corporate stenographer as in the present case. While it may be true that the corporate stenographer is part of the machinery of the corporation, and that the dictation and stenography are but links in the chain of the corporate business, still it cannot be gain-said that the stenographer, whether for a corporation or an individual, has read the notes in order to transcribe them, and has thus become the required human agency which spells out publication. The evil is in the reading of the defamatory words by the stranger. It is only necessary that the stranger to the libel shall read and understand, and whether he or she is a corporate stenographer or the stenographer of a private individual, in fairness and reason, should not be the deciding factor."

To the same effect is *Horowitz* v. *Weidenmiller*, 53 N.Y.S. (2d) 379.

The case of *Loenwintham* v. *Beth David Hospital*, (1938), (Sup. Ct. N. Y. Cty.), 9 N.Y.S. (2d) 367, holds that in the case of a corporation officer dictating a letter to his secretary there is no publication. We feel, however, that the law of the case was stated by Chief Justice Cardozo in the *Ostrowe* case, supra, for that opinion is from the highest court in the state.

It is worthy of comment that four of the greatest judges America has produced have passed on the questions raised in this case. The opinion in *White* v. *Nicholls* was handed down by the Supreme Court when Justices Taney and Storey were on the court. The opinion in the *Ostrowe* case was written by Chief Justice Cardozo, who is probably the greatest judge the courts of New York have known.

The fourth great judge whose court considered a question in this case was Thomas M. Cooley of Michigan. While he was on the Supreme Court of Michigan the case of *Bacon* v. *Michigan Cent. R. Co.*, 21 N. W. 324, came up for decision. In that case an action in libel was brought by a discharged employee of a corporation against the corporation. The corporate defendant kept a list of discharged employees, upon which was noted the reason for the discharge. This list was sent to 29 heads of departments along its railroad where 29 agents had authority to employ men for the railroad. The particular discharge list involved bore the plaintiff's name and stated that he was discharged for "stealing." The only question involved in the case was whether the libel had been published. The court said:

> "• • • But the argument is, and the circuit judge so held, that the transmission of the libel from the superintendent to the 29 heads of department in Michigan, Indiana and Illinois was only passing the libel from one

agent of defendant to another agent of defendant, and it had never reached the hands or knowledge of a third person, but, in fact, remained in the possession of the composer. The argument is wholly untenable. If a person composed a libel and sent it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is sufficient publication to support the action.

"There are in this country railroad and telegraph corporations whose lines extend through many states, and who employ many thousand agents. There are a great number of insurance companies employing agencies in several states. Can it be possible that these corporation possess an immunity to defame any person by sending such libel to every agent in their employment? Why should they possess this immunity more than an individual employing a large number of agents? Why should it be held a publication in one case and not in the other? In my opinion, every agent to whom this discharge list was delivered was a third person respecting this corporation and the plaintiff, and it constituted a publication of the libel. * * *

"The ruling of the court below in rejecting the discharge list as evidence, and holding that there had been no publication, foreclosed the plaintiff from the opportunity of introducing such proof. The judgment must be reversed and a new trial granted.

"(The other justices concurred.)"

The doctrine that a corporation by which the plaintiff is employed cannot be held to respond in damages for libel communicated to its other employees would be devastating. Consider the state of employees in this modern age. A man is employed by the Tennessee Coal, Iron & Railroad Company in Birmingham. He is one employee among 40,000. He spends his adult life working for that one company. He lives in a company house in a city largely populated by company employees. His friends and acquaintances are likewise employees of the same corporation. Few

people outside the employees of the company ever heard of him. The only way his reputation could be damaged by a defamation would be for that defamation to reach the ears of the employees of his employer. All employees of vast corporations become lesser citizens. Other men and women have a right of action for defamation, but they do not.

Fortunately there are many authorities which show that a communication by one agent of defendant to another agent of defendant is a publication. See cases listed and discussed in the annotation beginning at page 114 of Vol. 166, A.L.R., which also lists cases to the contrary.

Specification of Error No. 2

This specification challenges the holding of the District Court which was not disapproved by the court below, that the suggestion of the plaintiff to Senator Sparkman operated as a request for and consent to the giving of misinformation in the form of a false and malicious libel.

It seems to us that the language of Judge Garvin, in the case of *Nelson* v. *Whitten*, 272 F. 135, is a correct statement of the law:

> "So far as the latter ground is concerned the defendant was only requested to furnish a statement in writing; if he did not care to do so he could have refused the request. It is alleged that the statement derogatory to plaintiff was false. For the purpose of this motion the falsity must be conceded. *Because of a request for such statement, plaintiff did not invite defendant to make public anything false and defamatory.*" (Emphasis supplied)

Conclusion

It seems to me that this case is indeed important enough for this court to grant the writ. While the superficial ques-

tions are in the law of libel, the practices sought to be concealed under that law touch millions of American citizens. If the individual electors can be herded in multitudes at the will of vast corporate employers who can protect themselves against redress by setting up an absolute privilege conferred by judicial legislation and a lack of publication found by inconsistent and unrealistic reasoning, the outlook for a free expression of opinion by vast numbers of American voters becomes dark and grim. To me it is a danger which I trust the members of this court, as the ultimate guardians of our freedom, will be alert to avert.

If we diagram the immediate constituent elements of an ordinary act of libel by an individual and by a corporation we find that one diagram gives a correct picture of both. We see a human being dictating, a stenographer taking notes and that stenographer transcribing her notes. These factors are one and the same as between individual libel and corporate libel. The stenographer does not cease to be a person, a human being, while working for the invisible, intangible, incorporeal entity, her corporation employer. If publication is a factual event it necessarily follows that if there is publication by the individual there is publication by the corporation.

Suppose Mr. Mims had sued Mr. Taylor for libel in the state of New York. The doctrine of Ostrowe v. Lee would have compelled the New York court to hold there was publication. It is impossible for me to picture the same fixed facts oscillating between publication and no publication. Is not the question one of immunity or privilege rather than one of publication?

If we extend our diagram beyond the immediate elements we find in one case an individual cooking up a libel in his own mind. In the other case we would probably find officers of a corporation concocting the libel in a conference.

Clearly there is less reason for conferring immunity on the group than there is on the individual. While an individual cooks up a libel to vent his own spleen and the officers of the corporation concoct one to protect the invisible entity their desire to protect is not so altruistic as to justify injuring a living person in order to protect the invisible entity. Their desire is no doubt tinctured by a very personal desire to escape the consequences themselves.

Since there is no factor to be found in the act of committing a libel in the corporate case that is not also found in the individual case, we must look elsewhere to find any justification for corporate immunity as against individual liability.

We believe there is no justification because of practical necessity. An individual needs a stenographer just as badly as a corporation. Without a stenographer I couldn't file a paper in this and other appellate courts.

If the court is to indulge in any fanciful merger of identity between the stenographer and her employer, I believe the merger is easier as between an individual and his one stenographer than it is between the Metropolitan Life Insurance Co. and its regiments and brigades of stenographers.

If the justification for corporate immunity is to be sought not in the immediate constituent elements but in differences in the ultimate effects and consequences of a libel by an individual and libel by a corporation we believe that it will not be found.

Apparently there is no law of nature and no law of economics which puts a maximum limit on the size that a corporation may approach and attain. I know of no state law which limits their size. Because of the revenues derived in taxation a state lacks any incentive to curb the growth of its corporate creatures. There is no force in America

adequate to control corporations which spread from state to state, nation to nation, and continent to continent, except the Congress of the United States.

If the size of these entities is to increase without limit their power will obviously increase. The ratio between the strength of the individual and the strength of the corporation becomes infinitesimal. The only person to whom the individual can go for help or redress in the enactment of laws to curb harmful practices of vast corporations is a member of the Congress of the United States. The opinion of the court below holds, in effect, that if the individual goes to the only person on earth who can correct a situation, he thereby subjects himself to injury from libel for which he has scanty redress.

It is difficult to believe that a request for information justifies the giving of misinformation. A prayer for relief does not justify the infliction of punishment; to beg for bread is not to ask for a stone. When a man asks for the truth, and information is the truth, he is not asking for a false and malicious libel.

Suppose Mr. Mims had sued Mr. Taylor for libel in the District of Columbia. The doctrine of the Haan case would have required a finding that there had been publication. Suppose Mr. Taylor had mailed the letter directly to Mr. Mims and a grand jury had indicted him in the District of Columbia. The quoted provisions of the Code of the District of Columbia would have compelled a finding that there had been a publication. If a communication to the plaintiff himself is a publication under the law of the District, then a fortiori a communication to a United States Senator is a publication to a third person.

Respectfully submitted,

CRAMPTON HARRIS,
Attorney for Petitioner.

APPENDIX

Penal Code of New York, 1939, Sec. 1340—Libel Defined.

A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, *or which has a tendency to injure any person,* corporation or association of persons, *in his or their business or occupation,* is a libel. (Emphasis supplied)

Code of the District of Columbia:

22-2302—Libel—Publication—Sufficiency

To knowingly send or deliver any libelous communication to the party libeled is a sufficient publication to subject the person sending or delivering the same to punishment as provided in section 22-2301 (Mar. 3, 1901; 31 Stat. 1323, Ch. 854, Sec. 816.).

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 632.

OSCAR L. MIMS,
Petitioner,

versus

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari.

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SUPREME COURT OF THE UNITED STATES.

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BRIEF

In Opposition to Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

This is an action for libel, based upon a letter written by the president of respondent (defendant in the District Court and appellee in the Court of Appeals) to Senator John Sparkman of Alabama. Petitioner fancied that his demotion from a district managership of one of defendant's local district offices in Alabama to an assistant managership was caused by his refusal to contribute one dollar to the campaign fund of Senator Taft of Ohio, as suggested by a chain letter sent by defendant's supervisor of

agencies to several district managers, one of whom forwarded a copy to plaintiff. Plaintiff wrote Senator Sparkman, stating his suspicion and the facts upon which he based it, and requested Senator Sparkman to look into the matter, suggesting that on plaintiff's behalf he write the defendant concerning it (R. p. 156, Ex. 3). Senator Sparkman thereupon wrote the president of the defendants, summarizing the information and suspicions given him by the plaintiff, and asking for "your attention to this matter and your giving me such information as you may care to give" (R. p. 19, Ex. A [to Answer]). The defendant's president replied to Senator Sparkman, stating that there was no basis for the charge made by plaintiff, and explaining that the real reason for plaintiff's demotion was the fact that his management of the district office was unsatisfactory and that he failed to make good as manager (R. p. 21, Ex. B [to Answer]).

The District Court entered judgment for defendant on motion for summary judgment. It rested its findings and judgment upon these three alternative grounds (R. pp. 181-184):

> There was no publication of the communication either in New York or in the District of Columbia.
>
> The communication was made with the plaintiff's consent.
>
> The communication was made in the course of a proceeding judicial in nature and was absolutely privileged.

The Court of Appeals dealt with only one of these alternatives, affirming on the ground that there was no publication. The Court expressly stated that it did not reach the question of privilege, since publication had not been established (R. p. 200).

Obviously under these circumstances the Court of Appeals did not have to pass upon any other issue. Notwith-

standing, petitioner seeks to have this Court review the decision of the District Court upon the remaining alternative grounds, presenting them as Questions (A) and (B) in his statement of the questions presented (Petition p. 3) and devoting the major portion of his argument to the District Court's determination based on absolute privilege (Petitioner's Brief, pp. 9-14).

QUESTIONS PRESENTED.

Petitioner contends that four questions are presented for review (Petition p. 3). The first of these is correctly stated in the petition. It is as follows:

> "1. Is it the law of the state of New York that dictation of a letter by an officer of a corporation to a stenographer in the employ of that corporation and its subsequent transcription by the stenographer is not a publication by the corporation employer?"

The second question is incorrectly stated in the petition to be whether it is the law of the District of Columbia that a United States Senator, who writes at the suggestion of the plaintiff, must be considered as the representative of the plaintiff. No such broad question is presented by the decision below. The true question is:

> "2. Is it the law of the District of Columbia that a communication to one who has solicited the communication at the express request of plaintiff is in legal effect a communication to the plaintiff himself and does not constitute a publication?"

These are the only questions presented by the decision of the Court of Appeals.

While we are confident there is no occasion in this case for this Court to review questions not passed upon by the Court of Appeals, we deem it appropriate to point

out that those questions, if treated as if presented for review, are incorrectly stated in the petition.

One of these questions [numbered (A) in the petition] is stated by petitioner to be whether a reply by the defendant to a request by a United States Senator for such information as it might care to give is absolutely privileged. The decision of the District Court presented no such broad issue. A correct statement of the question (had it been passed upon by the Court of Appeals) is:

> "(A) Where charges of improper conduct by the defendant in an election of one United States Senator have been made to another member of the Senate, is the defendant's reply to a letter from such member requesting information concerning such charges entitled to the immunity afforded in a proceeding judicial in nature?"

The remaining issue based upon the last alternative finding of the District Court [numbered (B) in the petition] is misstated by the petitioner to be whether a suggestion by the plaintiff that a United States Senator ask defendant for such information as defendant might care to give operates as a request for and consent to the giving of misinformation. This question, not reached by the Court of Appeals, would be accurately stated as follows:

> "(B) Is one who requests another to solicit a reply from a third person precluded by the principle of volenti non fit injuria from recovering for a communication of the reply which does not exceed the scope of the request?"

SUMMARY OF THE ARGUMENT.

In the absence of a conflict with applicable local decisions, this Court will not grant a writ of certiorari to determine whether the Court of Appeals correctly decided (a) that under the law of the state of New York dictation by an officer and transcription by a stenographer, both employees of a corporation, is not a publication by the corporate employer, or (b) that under the law of the District of Columbia a communication to one who solicits it at the request of the plaintiff is in effect a communication to the plaintiff himself and is not a publication.

There is no conflict between the present decision and the controlling decisions of the courts of New York on the first question. The highest court of New York not having decided the question, the Court of Appeals was governed by the decisions of the intermediate appellate court of the state.

As to the second question there is no conflict between the present decision and the decisions of the courts of the District of Columbia.

The Court of Appeals followed established judicial practice when it declined to consider questions which were unnecessary to its determination and disposition of the case.

No question of importance either requiring or justifying review by this Court is presented in the record.

ARGUMENT.

The Questions Actually Determined.

The only questions presented for review by the decision of the Court of Appeals are concerned with the local libel law of New York and the District of Columbia. The question under the law of each of those jursisdictions was: On the particular facts shown, was there a publication of the allegedly libelous communication?

Ordinarily this Court is not concerned with the local law either of the state of New York or of the District of Columbia, and under paragraph 5 (b) of Rule 38 will decline to review a decision of the Court of Appeals dealing with local law unless the question is an important one and that court has decided it in a manner probably in conflict with applicable local decisions. **Ex parte Woods,** 143 U. S. 202; **Ruhlin v. New York Life Insurance Company,** 304 U. S. 202; **Fields v. United States,** 205 U. S. 292; **Del Vecchio v. Bowers,** 296 U. S. 280.

While it is not believed that the narrow questions of publication are "important" questions of local law within the scope of Rule 38, nevertheless if the contrary be conceded, there is no occasion for the grant of a writ here, since the decision of the Court of Appeals is in accord, rather than in conflict with applicable local decisions.

1. **The Law of New York.** The Court of Appeals held that the dictation of a letter by an officer of a corporation to a stenographer employed by the corporation, and the transcription of the notes by the stenographer, does not constitute a publication by the corporate employer under the law of the state of New York.

The highest court of New York has never passed upon the precise question. However, this question has been de-

cided by both the First and Second Departments of the Appellate Division of the Supreme Court, and in both decisions that court held that under such circumstances there was no publication by the corporate employer. **Owen v. Ogilvie Publishing Co.**, 32 App. Div. 465, 53 N. Y. S. 1033 (Second Department), and **Wells v. Belstrat Hotel Corporation**, 212 App. Div. 366, 208 N. Y. S. 625 (First Department).

In a later case the Court of Appeals of New York held that dictation of a libelous letter by an individual to his own employee constitutes a publication by the individual who dictated the letter. **Ostrowe v. Lee**, 256 N. Y. 36, 175 N. E. 505. However, nothing in the court's opinion in any way disapproved the holding in the **Owen** and **Wells** cases, where a corporate employer was involved; and the decisions of the two lower courts in **Ostrowe v. Lee** distinguished that case from the **Owen** and **Wells** cases on that ground.

Subsequent to the decision in **Ostrowe v. Lee**, the Supreme Court, Richmond County, rejected the ruling announced in the **Owen** and **Wells** cases on the erroneous theory that they had been overruled by **Ostrowe v. Lee** (**Bradley v. Conners**, 169 Misc. 442, 7 N. Y. S. [2d] 294), but in a later case the Supreme Court, New York County, reaffirmed and followed the **Owen** and **Wells** cases, recognizing that **Ostrowe v. Lee** did not apply. **Loewinthan v. Beth David Hospital**, 9 N. Y. S. (2d) 367.

No other New York case deals with the question. **Horowitz v. Weidenmiller**, 53 N. Y. S. (2d) 379 (Sup. Ct., N. Y. County), and **Nelson v. Whitten**, 272 Fed. 135 (D. C. E. D., N. Y.), like **Ostrowe v. Lee**, deal with communications dictated by an individual defendant.

Since the highest court of New York has not decided the question, the Court of Appeals for the Fifth Circuit was

governed by the decisions of the Appellate Division, the intermediate appellate court of that state. **Six Companies of California v. Joint Highway District No. 13,** 311 U. S. 180; **West v. American Telephone & Telegraph Co.,** 311 U. S. 223; **Soner v. New York Life Insurance Company,** 311 U. S. 464. The Court's opinion correctly followed the holding of the Appellate Division in the **Owen** and **Wells** cases.

If the two later decisions of the Supreme Court are considered as authoritative (see **Fidelity Union Trust Co. v. Fields,** 311 U. S. 169, and **King v. Order of United Commercial Travelers,** 333 U. S. 153), they are in conflict, and the Court of Appeals for the Fifth Circuit correctly declared the law of the state in accordance with the latest decision and the weight of authority in the state. **Concordia Insurance Company v. School District No. 98,** 282 U. S. 545; **Samuels v. Quartin,** 108 F. (2d) 789 (2d Cir. 1940); **Franzen v. E. I. DuPont De Nemours and Company,** 146 F. (2d) 837 (3rd Cir. 1944).

2. **The Law of the District of Columbia.** The Court of Appeals found it to be the law of the District of Columbia that a communication to one who solicits it "at the request" and "with the approval" of plaintiff is in contemplation of law a communication to the plaintiff himself and does not constitute a publication.

Petitioner contends that this holding is in direct conflict with the decision of the Court of Appeals for the District of Columbia in **National Disabled Soldiers League v. Haan,** 4 F. (2d) 436. There the trial judge directed a verdict for the defendant on the ground that the communication was made on a qualifiedly privileged occasion and actual malice was not shown, and in affirming, the Court of Appeals treated that question only, and did not touch upon the question of publication. In the instant case the Court of Appeals rightly declined to read into the **Haan** case a holding that was not there. It concluded that the **Haan** case

was not an authority on the question of publication. The correctness of the conclusion is well supported in the annotation in 172 A. L. R. 213, wherein it is stated that: "Where the particular communication in such a case is held to be privileged and it is also concluded that the privilege was not lost or abused, the decision cannot be said to be of any weight upon the question of publication."

Petitioner cites a criminal statute of the District of Columbia (Section 22-2302, Code of the District of Columbia) to support his contention that there was a publication there. The statute adds no strength to petitioner's position. Courts and text-writers alike have consistently recognized a distinction between civil and criminal actions for libel. Authorities uniformly agree that the meaning of publication is broader in criminal prosecutions than in civil actions and that, in the former, communication of libelous matter to anyone at all, even to the persons defamed, is a publication, while the rule in civil actions is directly opposite. 33 **Am. Jur.**, p. 293.

Since there is no controlling case on the question from a court in the District, the Court of Appeals was free to find the law of the District in accordance with the best reasoned authorities. **Concordia Insurance Company v. School District No. 98**, supra; **Samuels v. Quartin**, supra; **Franzen v. E. I. DuPont De Nemours and Company**, supra.

It is submitted that no reason exists for a review by this Court of the decision of the Court of Appeals.

Questions Urged by Petitioner, But Not Presented by the Decision of the Court of Appeals.

Since the only questions presented for review by the decision of the Court of Appeals are not of such character as to justify review by this Court, it is understandable that petitioner seeks to present other reasons why the writ

should be granted. These other reasons are rested upon the alternative grounds of the District Court's decision, which the Court of Appeals declined to pass upon.

While those grounds involve no issue which, under Rule 38, calls for review by this Court, it is unnecessary to consider that question, for this Court will not grant a writ of certiorari to determine an issue which, being unnecessary for decision, was not decided by the Court of Appeals.

The well-established judicial practice is that if an appellate court may determine the case upon one controlling and decisive ground it is proper for it to decline to consider other grounds. **Jones v. Randolph**, 104 U. S. 108; **Glascow v. Baker**, 128 U. S. 560; **Sun Insurance Office v. Scott**, 284 U. S. 177. The Court of Appeals followed the practice sanctioned and pursued by this Court when, placing its decision upon lack of publication, it declined to go further into the case and pass upon other alternative grounds of the District Court's decision.

The Courts of Appeals are courts of final jurisdiction and this Court will grant a writ of certiorari only to review questions decided by that court. Rule 38 (5) (b). Where the decision of the Court of Appeals rests upon a ground not justifying review by this Court, certiorari will not be granted to review a holding by the District Court upon another issue. **Hunt v. Western Casualty Co.**, 293 U. S. 530.

That this Court should grant certiorari for the purpose of itself deciding or of requiring the Court of Appeals to decide issues which that court properly declined to pass upon is a wholly untenable proposal. If this Court should issue the writ for that purpose, then the Courts of Appeals will no longer be courts of final jurisdiction and certiorari will be merely a means of giving the defeated party another hearing.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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I hereby certify that I have served a copy of the foregoing Brief and Argument upon Crampton Harris, Esq., Attorney for Petitioner, on this the 1st day of April, 1953.

Lucien D. Gardner, Jr.,
Attorney for Respondent.